

CHAPTER 36

FISCAL LAW FOR COMMANDERS

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FISCAL LAW FOR COMMANDERS

I. INTRODUCTION.

- A. The U.S. Constitution gives Congress the authority to raise revenue, borrow funds, and appropriate the proceeds for federal agencies. In implementing these express constitutional powers, Congress limits strictly the obligation and expenditure of public funds by the executive branch. Congress regulates virtually all executive branch programs and activities through the appropriations process.
 - 1. Congress has enacted fiscal controls, which, if violated, subject the offender to serious adverse personnel actions and criminal penalties.
 - 2. Congress and the Department of Defense (DoD) have agreed informally to additional restrictions. The DoD refrains from taking certain actions without first giving prior notice to, and receiving consent from, Congress. These restraints are embodied in regulation.
- B. What are the Major Fiscal Limitations?
 - 1. An agency may obligate and expend appropriations only for a proper purpose;
 - 2. An agency may obligate only within the time limits applicable to the appropriation (e.g. O&M funds are available for obligation for one fiscal year); and
 - 3. An agency may not obligate more than the amount appropriated by the Congress.
- C. Philosophy of Fiscal Law. The Supreme Court's Fiscal Philosophy: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." United States v. MacCollom, 426 U.S. 317 (1976).

II. AVAILABILITY AS TO PURPOSE.

- A. What is the “Proper Purpose” Rule? The “Purpose Statute” provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. 31 U.S.C. § 1301(a).
- B. The Purpose Statute does not require Congress to specify the purpose of every expenditure in an appropriations act, although it does specify the purpose of many expenditures. The DoD has reasonable discretion to determine how to accomplish the purpose of an appropriation. Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Mach., B-226065, 66 Comp. Gen. 356 (1987).
- C. Determining the Purpose of a Specific Appropriation—Where Do You Look?
 - 1. Appropriations Acts. The DoD has nearly one hundred separate appropriations available to it for different purposes.
 - 2. Appropriations are differentiated by service (Army, Navy, etc.), component (Active, Reserve, etc.), and purpose (Procurement, Research and Development, etc.). The major DoD appropriations provided in the annual Appropriations Act are:
 - a. Operation & Maintenance (O&M)—used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;
 - b. Personnel—used for pay and allowances, permanent change of station travel, etc.;
 - c. Research, Development, Test and Evaluation (RDT&E)—used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment; and
 - d. Procurement—used for production and modification of aircraft, missiles, weapons, tracked vehicles, ammunition, shipbuilding and conversion, and “other procurement.”

3. The DoD also receives smaller appropriations for other specific purposes (e.g., Humanitarian Assistance, Chemical Agents and Munitions Destruction, etc.).
4. Congress appropriates funds for military construction separately.
5. By regulation, the DoD has assigned most types of expenditures to a specific appropriation. See DFAS-IN Manual 37-100-XXXX, The Army Management Structure (July XXXX). The manual is reissued every FY. XXXX= appropriate FY.

D. Fund Cites.

III. TYPICAL QUESTIONABLE EXPENSES.

- A. Clothing. Clothing is generally a personal expense. IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized). But see 5 U.S.C. § 7903 (authorizes purchase of special clothing, for government benefit, which protects against hazards); White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (tuxedo rental or purchase for employees authorized); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (safety shoes authorized).

B. Food.

1. General Rule. Buying food for individual employees – at least those who are not away from their official duty station on travel status – generally does not materially contribute to an agency's mission performance. As a result, food is generally considered a personal expense. See Expenditures by the Department of Veterans Affairs Medical Center, Oklahoma City, Oklahoma (II), B-247563, Dec. 11, 1996 (unpub.) (concluding that appropriated funds were not available for employee breakfasts or meetings); Pension Benefit Guaranty Corp.—Provision of Food to Employees, B-270199, Aug. 5, 1996 (unpub.) (concluding that appropriated funds were not available to provide food and drink during organizational effectiveness sessions); Department of the Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (concluding that the provision of coffee and doughnuts was an unauthorized entertainment expense).

2. Exceptions.

- a. All inclusive facility / food fee. GAO-sanctioned exception where food is included as part of a facility rental cost. GAO has indicated that it is all right for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and comparably priced to the fees of other facilities that do not include food as part of their rental fee. See [Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, Dec. 1, 1999 \(unpub.\)](#).
- b. “Light Refreshments.” Regulatory-based “Light Refreshments” Exception. Through 27 January 2003, federal agencies commonly paid for “light refreshments” at government-sponsored conferences under a regulatory exception found in the travel regulations where a majority of the attendees were from a different permanent duty station than the sponsoring activity. See Federal Travel Regulation, [Part 301-74](#). See also Joint Federal Travel Regulation (JFTR), ch. 2, para. U2550; Joint Travel Regulation (JTR), ch. 4, para. C4950. The JFTR as well as the JTR may be found at: <http://www.dtic.mil/perdiem/trvlregs.html>. That exception was recently overturned, at least with respect to paying for the refreshments given to any personnel not on travel status. See [Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, Jan. 27, 2003 \(unpub.\)](#).
- c. Formal Meetings and Conferences. Under [5 U.S.C. § 4110](#), the government may pay for meals while government employees are attending meetings or conferences if: 1) the meals are incidental to the meeting; 2) attendance of the employees at the meals is necessary for full participation in the meeting; and 3) the employees are not free to take meals elsewhere without being absent from the essential business of the meeting.
 - (1) This exception does **not apply to purely internal business meetings or conferences sponsored by government agencies**. See [Pension Benefit Guar. Corp.—Provision of Food to Employees, B-270199, 1996 U.S. Comp. Gen. LEXIS 402 \(Aug. 6, 1996\)](#); [Meals for Attendees at Internal Gov’t Meetings, B-230576, 68 Comp. Gen. 604 \(1989\)](#).

- (2) This exception also does **not apply to military members (it applies only to civilian employees)**. But see JFTR, ch. 4, para. U4510, which authorizes military members to be reimbursed for occasional meals within the local area of their Permanent Duty Station (PDS) when the military member is required to procure meals at personal expense outside limits of the PDS.
- d. Training. Under [5 U.S.C. § 4109](#) (applicable to civilian employees) and [10 U.S.C. § 4301](#) and [10 U.S.C. § 9301](#) (applicable to service members), the government may provide meals if necessary to achieve the objectives of a training program. See Coast Guard—Meals at Training Conference, B-244473, Jan. 13, 1992 (unpub.).
- (1) The GAO and other auditors will not merely defer to an agency’s characterization of a meeting as “training.” Instead, they will closely scrutinize the event to ensure it was a valid training activity and that the food was actually necessary to achieve the objectives of that training. See Corps of Eng’rs—Use of Appropriated Funds to Pay for Meals, B-249795, May 12, 1993 (unpub.) (determining that quarterly managers meetings of the Corps did not constitute “training”); See also Pension Benefit Guar. Corp.—Provision of Food to Employees, *supra*. (determining that food was not needed for employee to obtain the full benefit of training).
- (2) This exception is often utilized to provide small “samples” of ethnic foods during an ethnic or cultural awareness program. See Army — Food Served at Cultural Awareness Celebration, B-199387, 1982 U.S. Comp. Gen. LEXIS 1284 (Mar. 23, 1982). See also AFI 65-601, vol. 1, para. 4.26.1.2.
- e. Award Ceremonies. Under [5 U.S.C. §§ 4503-4504](#) (civilian incentive awards) and [10 U.S.C. § 1124](#) (military cash awards), federal agencies may “incur necessary expenses” including purchasing food to honor an individual that is given an award made on the basis of one or more of the above statutory authorities.

- (1) Relevant GAO Opinions. [Defense Reutilization and Mktg. Serv. Award Ceremonies, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 \(Mar. 12, 1997\)](#) (authorizing the agency expending \$20.00 per attendee for a luncheon given to honor awardees under the Government Employees Incentive Awards Act); [Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 \(1986\)](#) (agencies may use appropriated funds to pay for refreshments incident to employee awards ceremonies [applies to both 5 U.S.C. § 4503 and 10 U.S.C. § 1124] which expressly permit agency to “incur necessary expense for the honorary recognition. . .”).
- (2) Relevant Regulations. Awards to civilian employees must be made in accordance with [5 C.F.R. Part 451](#). Awards to DOD civilians must also be done in accordance with [DoD 1400.25-M, subchapter 451](#) as well as [DOD FMR, vol. 8, ch. 3, para. 0311 \(Aug. 1999\)](#). For Army civilians, the award must also be made in accordance with [AR 672-20, Incentive Awards \(29 January 1999\)](#) and [DA Pam 672-20, Incentive Awards Handbook \(1 July 1993\)](#). For Air Force civilians, the award must also be made in accordance with [AF Pam 36-2861, Civilian Recognition Guide \(1 June 2000\)](#). See also [AFI 65-601, vol. 1, para. 4.31](#).
- (3) **NOTE:** [10 U.S.C. § 1125](#) governs the Secretary of Defense’s (SECDEF) authority to award medals, trophies, badges, etc. to service members. This statute does not have the express “incur necessary expense” language of 5 U.S.C. § 4503 or 10 U.S.C. § 1124. Therefore, food may not be purchased with appropriated funds and served at an awards ceremony conducted solely under the authority of 10 U.S.C. § 1125.

f. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to pay for receptions for distinguished visitors. See discussion *infra* Part **Error! Reference source not found.** of this chapter for an overview.

- C. Bottled Water. Bottled Water. Bottled water generally does not materially contribute to an agency's mission accomplishment. It is therefore generally a personal expense.
1. GAO-Sanctioned Exception Where Water is Unpotable. Agencies may use appropriated funds to buy bottled water where a building's water supply is unwholesome or unpotable. See United States Agency for Int'l Dev.—Purchase of Bottled Drinking Water, B-247871, 1992 U.S. Comp. Gen. LEXIS 1170 (Apr. 10, 1992) (problems with water supply system caused lead content to exceed “maximum contaminant level” and justified purchase of bottled water until problems with system could be resolved).
 2. Relevant Regulations. See also DOD FMR, vol. 10, ch. 12, para. 120203 (permitting the purchase of water where the public water is unsafe or unavailable); AFI 65-601, vol. 1, para. 4.45 (discussing the same); AR 30-22, para. 5-19 (discussing the need to obtain approval from HQDA prior to purchasing bottled water, even in the context of a deployment / contingency).
- D. Workplace Food Storage and Preparation Equipment (i.e. microwave ovens; refrigerators; coffee pots).
1. In the past, the Comptroller General opined that buying food storage and/or preparation equipment generally did not materially contribute to an agency's mission performance. As a result, these items were generally considered to be a personal expense.

2. Under a “necessary expense” analysis, the GAO sanctioned the use of appropriated funds to buy food storage and preparation equipment only when the purchase was “reasonably related to the efficient performance of agency activities, and not just for the personal convenience of individual employees.” This situation generally arose only when there were no commercial eating facilities available in the location, or when employees worked extended hours and restaurants were not open during much of this time. See e.g., Central Intelligence Agency-Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230 (determining that commercial facilities were not proximately available when the nearest one was a 15-minute commute away from the federal workplace); Purchase of Microwave Oven, B-210433, 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (determining commercial facilities were unavailable when employees worked 24 hours a day, seven days a week and restaurants were not open during much of this time).
3. In June, 2004 the GAO revisited this issue and determined that regardless of the availability of commercial eating facilities, food storage and/or preparation equipment did reasonably relate to the efficient performance of agency activities, and thus appropriated funds could be spent for these items. See Use of Appropriated Funds to Purchase Kitchen Appliances, B-302993 (June 25, 2004). In support of this decision, the Comptroller General observed that these items reasonably related to workplace safety in that, as a result of fire safety measures, employees were not allowed to have coffee makers in their workspace areas. However, the opinion went beyond the issue of safety by noting that providing such equipment results in benefits for the agency, “including increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment.” Further, the Comptroller General noted that purchasing such equipment “is one of many small but important factors that can assist federal agencies in recruiting and retaining the best work force and supporting valuable human capital policies.” (Note: agency level regulations and policies should be consulted prior to applying this decision.)

E. Entertainment. Entertaining people generally does not materially contribute to an agency’s mission performance. As a result, entertainment expenses are generally considered to be a personal expense. See HUD Gifts, Meals, and Entm’t Expenses, B-231627, 68 Comp. Gen. 226 (1989); Navy Fireworks Display, B-205292, Jun. 2, 1982, 82-2 CPD ¶ 1 (fireworks unauthorized entertainment).

1. Statutory-based Exceptions. Congress does occasionally provide permanent or one-time authority to entertain. See Claim of Karl Pusch, B-182357, Dec. 9, 1975 (unpub.) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club—twice); Golden Spike Nat’l Historic Site, B-234298, 68 Comp. Gen. 544 (1989) (discussing authority to conduct “interpretive demonstrations” at the 1988 Annual Golden Spike Railroader’s Festival).
 2. Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. Internal Revenue Serv.—Live Entm’t and Lunch Expense of Nat’l Black History Month, B-200017, 60 Comp. Gen. 303 (1981) (determining a live African dance troupe performance conducted as part of an Equal Employment Opportunity (EEO) program was a legitimate part of employee training).
 3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to entertain distinguished visitors to the agency. See To The Honorable Michael Rhode, Jr., B-250884, March 18, 1993 (unpub.) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).
- F. Decorations. Under a “necessary expense” analysis, GAO has sanctioned the use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience. See Department of State & Gen. Serv. Admin.—Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (modest expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee proper); But see The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (determining Christmas cards were not a proper expenditure because they were for personal convenience). See also AFI 65-601, vol. 1, para. 4.26.2. NOTE: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, Hanukkah, etc.)

- G. Business Cards. Business Cards. Under a “necessary expense” analysis, the GAO has recently sanctioned the use of appropriated funds to purchase business cards for agency employees. See Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, B-280759, Nov. 5, 1998 (purchase of business cards with appropriated funds **for government employees who regularly deal with public or outside organizations** is a proper “necessary expense”).
1. This case “overturned” a long history of Comptroller General’s decisions holding that business cards were a personal expense because they did not materially contribute to an agency’s mission accomplishment. See, e.g., Forest Serv.—Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).
 2. More Restrictive Agency Level Regulations. The military departments have implemented policies that generally only permit recruiters and criminal investigators to purchase commercially prepared business cards. All others are permitted to use appropriated funds to purchase card stock and printer ink and then use in-house computing resources to print their own business cards. See AR 25-30, The Army Publishing and Printing Program, para. 11-11 (21 June 1999); DOD Directive 5330.3/AFSUP1, Defense Automated Printing Service (18 Feb. 1999); AFI 65-601, vol. 1, para. 4.36; Department of the Navy (Financial Management and Comptroller) memorandum, subject: Business Cards (9 Mar. 1999); but see Department of Defense memorandum, dated 15 July 1999 and Department of the Army memorandum, dated 2 August 1999 (indicating agencies may procure commercially prepared business cards from the Lighthouse for the Blind if the cost of procuring the cards is equivalent to or less than the cost of producing the cards on a personal computer).
- H. Telephones. Even though telephones might ordinarily be considered a “necessary expense,” appropriated funds may not generally be used to install telephones in private residences or to pay the utility or other costs of maintaining a telephone in a private residence. Congress decided to prohibit government phones in personal residences because their use was subject to great abuse. See 31 U.S.C. § 1348. See also Centers for Disease Control and Prevention—Use of Appropriated Funds to Install Tel. Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD ¶ 180 (appropriated funds may not be used to install telephone lines in Director’s residence); Use of Appropriated Funds to Pay Long Distance Tel. Charges Incurred by a Computer Hacker, B-240276, 70 Comp. Gen. 643 (1991) (agency may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate).

1. Exceptions for DOD and State Department. The above prohibition does not apply to the installation, repair, or maintenance of telephone lines in residences owned or leased by the U.S. Government. It also does not apply to telephones in private residences if the SECDEF determines they are necessary for national defense purposes. See 31 U.S.C. § 1348(a)(2) and (c). See also Timothy R. Manns—Installation of Tel. Equip. in Employee Residence, B-227727, 68 Comp. Gen. 307 (1989) (telephone in temporary quarters allowed). DOD may install telephone lines in the residences of certain volunteers who provide services that support service members and their families, including those who provide medical, dental, nursing, or other health-care related services as well as services for museum or natural resources programs. See 10 U.S.C. § 1588(f).
2. Exception for data transmission lines. If the phone will be used to transmit data, the above prohibition does not apply. See Federal Communications Comm’n—Installation of Integrated Servs. Digital Network, B-280698, Jan. 12, 1999 (unpub.) (agency may use appropriated funds to pay for installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in private residences of agency’s commissioners to agency’s local area network).
3. Cell Phones. The above prohibition only applies to phones installed in a personal residence and therefore does not prevent an agency from purchasing cell phones for its employees, if they are otherwise determined to be a necessary expense. Agencies may also reimburse their employees for the costs associated with any official government usage of personal cell phones, but such reimbursement must cover the actual costs – not the estimated costs – of the employee. See Reimbursing Employees’ Government Use of Private Cellular Phones at a Flat Rate B-287524, Oct. 22, 2001 (unpub.) (indicating that the agency may not, however, pay the employees a flat amount each month – in lieu of actual costs – even if the calculation of that flat amount is made using historical data).

4. Exception for teleworking. In 1996, Congress authorized federal agencies to install telephones and other *necessary equipment* in personal residences for purposes of teleworking. See [Pub. L. No. 104-52, § 620](#). Congress also required the Office of Personnel Management (OPM) to develop guidance on teleworking that would be applicable to all federal agencies. That guidance may be found at: <http://www.opm.gov/wrkfam/telecomm/telecomm.htm>. The Air Force also has some additional guidance found in [AFI 65-601, vol I, para 4.24.6](#).
- I. Fines and Penalties. The payment of a fine or penalty generally does not materially contribute towards an agency's mission accomplishment. Therefore, fines and penalties imposed on government employees and service members are generally considered to be their own personal expense and not payable using appropriated funds.
1. Exception Based Upon "Necessary Expense" Rule. If, in carrying out its mission, an agency forces one of its employees to take a certain action which incurs a fine or penalty, that fine or penalty may be considered a "necessary expense" and payable using appropriated funds. Compare To The Honorable Ralph Regula, B-250880, Nov. 3, 1992 (military recruiter is personally liable for fines imposed for parking meter violations because he had the ability to decide where to park and when to feed the meter); with To The Acting Attorney Gen., B-147769, 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee forced to act pursuant to agency regulations and instructions).
 2. Note: Agencies may also pay fines imposed on the agency itself if Congress waives sovereign immunity. See, e.g., [10 U.S.C. § 2703\(f\)](#) (Defense Environmental Restoration Account); [31 U.S.C. § 3902](#) (interest penalty).
- J. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that an employee incurs to obtain a license or certificate enabling them to carry out their duties are considered a personal expense rather than a "necessary expense" of the government. See A. N. Ross, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals not payable). See also [AFI 65-601, vol. 1, para. 4.47](#).

1. Exception—When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency—Request for Advance Decision, B-257895, Oct. 28, 1994 (unpub.) (drivers' licenses for scientists and engineers to perform security testing at remote sites); Air Force—Appropriations—Reimbursement for Costs of Licenses or Certificates, B-252467, June 3, 1994, (unpub.) (license necessary to comply with state-established environmental standards).
2. Legislative Exception. Section 1112 of the 2002 National Defense Authorization Act, Pub. L. No. 107-107, 115 Stat. 1654 (2001), adds 5 U.S.C. §5757 permitting agencies to reimburse the following expenses that their **competitive service employees** incur:
 - a. professional accreditation;
 - b. state-imposed professional licenses;
 - c. professional certification; and
 - d. the costs of any examinations required to obtain such credentials.
3. On 20 June 2003 the Assistant Secretary of the Army (Manpower and Reserve Affairs) issued a memorandum to MACOM Commanders authorizing payment for professional credentials, as permitted in 5 U.S.C. § 5757. This authority may be redelegated at the discretion of the MACOM Commanders. This memorandum is available at: <http://www.asmc certification.com/documents/Army-Reimbursement-Policy-20030620.pdf>. See also: <http://www.hq.usace.army.mil/cehr/d/traindevelop/USACE-credentials-policy-aug03.pdf> (Corps of Engineers implementing guidance).

- K. Awards (Including Unit or Regimental Coins and Similar Devices). Agencies generally may not use their appropriated funds to purchase “mementos” or personal gifts. See EPA Purchase of Buttons and Magnets, B-247686, 72 Comp. Gen. 73 (1992)(requiring a direct link between the distribution of the gift or memento and the purpose of the appropriation in order to purchase the item with appropriated funds). Congress has enacted various statutory schemes permitting agencies to give awards, however. These include:
1. Awards For Service Members. Congress has provided specific statutory authority for SECDEF to “award medals, trophies, badges, and similar devices” for “excellence in accomplishments or competitions.” [10 U.S.C. § 1125](#).
 - a. The Army has implemented this statute in [AR 600-8-22, Military Awards \(25 Feb. 1995\)](#). The bulk of this regulation deals with the typical medals and ribbons issued to service members (i.e. the Army Achievement Medal, the Meritorious Service Medal, the Purple Heart, etc).
 - b. Chapter 11 of the regulation allows the presentation of other nontraditional awards for “excellence in accomplishments and competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, that is, tank gunnery, weapons competition, military aerial competition.”
 - c. These awards must “be made on a one time basis where the achievement is unique and clearly contributes to increased effectiveness.” See AR 600-8-22, para. 11-2.
 - d. Theoretically, these awards could be made in the form of a coin, a trophy, a plaque, or a variety of other “similar devices.” The MACOM commander or head of the principal HQDA agency must approve the purchase of the particular item to be awarded, however. See AR 600-8-22, para. 1-7d. See also Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (approving the use of appropriated funds to purchase belt buckles as awards for the annual “Peacekeeper Challenge”).

- e. Specific Issues Concerning Unit or Regimental Coins. For a detailed discussion of the issues related to commanders' coins, see [Major Kathryn R. Sommercamp, *Commanders' Coins: Worth Their Weight in Gold?*, ARMY LAW., Nov. 1997, at 6.](#)
 - f. The Air Force and Navy/Marine Corps have similar awards guidance. See generally [AFPD 36-28, Awards and Decorations Programs, \(1 Aug. 1997\); SECNAVINST 3590.4A, Award of Trophies and Similar Devices in Recognition of Accomplishments \(28 Jan. 1975\).](#) See also [AFI 65-601, vol. 1, para. 4.29; OpJAGAF 1999/23, 1 Apr. 1999.](#)
2. Awards For Civilian Employees. Congress has provided agencies with various authorities to pay awards to their employees. See [Chapter 45 of Title 5](#) of the U.S. Code. The most often utilized authority used as a basis to issue an award to a civilian employee is that found at [5 U.S.C. § 4503](#), permitting
- a. Regulatory Implementation of this Authority. Awards to civilian employees must be made in accordance with [5 C.F.R. Part 451](#). Awards to DOD civilians must also be done in accordance with [DoD 1400.25-M, subchapter 451](#) as well as [DOD FMR, vol. 8, ch. 3, para. 0311 \(Aug. 1999\).](#) For Army civilians, the award must also be made in accordance with [AR 672-20, Incentive Awards \(29 January 1999\)](#) and [DA Pam 672-20, Incentive Awards Handbook \(1 July 1993\).](#) For Air Force civilians, the award must also be made in accordance with [AF Pam 36-2861, Civilian Recognition Guide \(1 June 2000\).](#)

- b. Non-Cash Awards. The statute technically states that the “head of an agency **may pay a cash award** to, and incur necessary expense for the honorary recognition of” one of their employees. The plain reading of this statute implies that non-cash awards, such as plaques and coins, are not authorized to be given to civilian employees. The agency regulations each expressly permit non-cash awards, however. Curiously, the GAO has sanctioned the giving of non-cash awards to civilian employees. See Awarding of Desk Medallion by Naval Sea Sys. Command, B-184306, Aug. 27, 1980 (unpub.) (desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements). As discussed *supra*, the GAO has also sanctioned the purchase of food as one of the expenses that it deems could be necessary to honor the awardees accomplishments. In such circumstances, the award is not the food just an incidental expense incurred to honor the awardee.
 - c. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to purchase mementoes for their distinguished visitors. See discussion *infra* Part **Error! Reference source not found.** of this chapter for an overview. In addition, commanders may use nonappropriated funds to purchase awards for intramural and athletic competitions. See AR 215-1.
 - L. Use of Office Equipment. [Use of Office Equip. in Support of Reserves and Nat’l Guard, B-277678, Jan. 4, 1999](#) (agency may authorize use of office equipment to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). See Office of Personnel Management memorandum, subject: Use of Official Time and Agency Resources by Federal Employees Who Are Members of the National Guard or Armed Forces Reserves (3 June 1999), which provides general guidance to assist federal agencies in determining under what circumstances employee time and agency equipment may be used to carry out limited National Guard or Reserve functions. An electronic copy of this memorandum may be found at: http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/OPMReserves.htm. See also CAPT Samuel F. Wright, *Use of Federal Government Equipment and Time for Reserve Unit Activities*, RESERVE OFFICERS ASS’N L. REV., May 2001 (providing a good overview of this authority).

IV. MILITARY CONSTRUCTION.

- A. Congressional oversight of the Military Construction Program is extensive and pervasive.
- B. Dollar Thresholds and Funding Sources (in the absence of separate statutory authority)
 - 1. Operations and Maintenance: 10 U.S.C. § 2805(c); Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, § 2805, 115 Stat. 2230 (2001). See also AR 415-15, para. 1-6c(1); AR 420-10, para. 4-1c.
 - a. General Prohibition on the Use of O&M Funds. 41 U.S.C. § 12. Most installations use O&M funds to finance routine operations; however, 41 U.S.C. § 12 prohibits a federal agency from entering into a public contract to build, repair, or improve a public building that binds the government to pay a sum that exceeds the amount Congress specifically appropriated for that purpose.
 - b. The Secretary of a military department may use O&M funds to finance Unspecified Minor Military Construction projects costing less than:
 - (1) \$1.5 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.
 - (2) \$750,000 if the project is intended for any other purpose.
- C. “Unspecified” Minor Military Construction (UMMC) Projects. 10 U.S.C. § 2805(a).
 - 1. Authorized Use. 10 U.S.C. § 2805(a). See AR 415-15, para. 1-6b(1) and App. B. The Secretary concerned may use these funds to carry out UMMC projects not otherwise authorized by law.

- a. An UMMC project is defined as a military construction project with an approved cost of \$1.5 million or less.
 - b. However, an UMMC project may have an approved cost up to \$3 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.
 - 2. Requirements for Use. 10 U.S.C. § 2805(b)(2); Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, § 2805, 115 Stat. 2230 (2001).
 - a. Before beginning an UMMC project with an approved cost greater than \$750,000, the Secretary concerned must approve the project.
 - b. In addition, the Secretary concerned must: 1) Notify the appropriate committees of Congress; and 2) Wait 21 days.
- D. “Specified” Military Construction Projects. 10 U.S.C. § 2802. The Secretary of Defense (SECDEF) and the Secretaries of the military departments may carry out military construction projects authorized by law.
- 1. Source of Funding. See, e.g., Military Construction Appropriations Act, 2003, Pub. L. No. 107-249, 116 Stat. 1578 (2002); H.R. CONF. REP. NO. 107-731 (2002). Congress provides annual funding and approval for “specified” military construction projects in the Military Construction Appropriations Act.
 - a. Congress funds the entire military construction program with lump sum appropriations. The Army’s principle appropriations are the “Military Construction, Army” (MCA) appropriation, and the “Family Housing, Army” (FHA) appropriation.
 - b. The conference report that accompanies the Military Construction Appropriations Act breaks down the lump sum appropriations by project.
 - 2. Authorized Use.

- a. Congress normally “specifies” military construction projects expected to exceed \$1.5 million.
 - b. A military department may not carry out military construction projects expected to exceed \$1.5 million without specific Congressional authorization and approval.
- E. Project scope is critical. A “military construction project” includes all work necessary to produce a complete and usable facility, or a complete and usable improvement to an existing facility. 10 U.S.C. § 2801(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.L; AR 415-15, para. 2-3a; AR 415-32, Glossary, sec. II; AR 420-10, para. 4-1c; see also The Honorable Michael B. Donley, B-234326, Dec. 24, 1991 (unpub.) (concluding that the Air Force improperly split a project involving 12 related trailers into 12 separate projects).
- F. Project “Splitting” is Improper. An agency may not treat “clearly interrelated” construction activities as separate projects. The Honorable Michael B. Donley, supra; The Honorable Bill Alexander, House of Representatives, B-213137, Jan. 30, 1986 (unpub).
- G. Combat and Contingency Related O&M Funded Construction. Within the last year, significant changes have taken place in the funding of combat and contingency related construction. In order to understand the current state of the law it is necessary to examine these changes as they have taken place.
1. Prior to April 2003, per Army policy, use of O&M funds in excess of the \$750,000 threshold discussed above was proper when erecting structures/facilities in direct support of combat or contingency operations declared pursuant to 10 U.S.C. § 101(a)(13)(A). See Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000). This policy applied only if the construction was intended to meet a temporary operational need that facilitated combat or contingency operations. The rationale for this opinion was that O&M funds were the primary funding source supporting contingency or combat operations; therefore, if a unit was fulfilling legitimate requirements made necessary by those operations, then use of O&M appropriations was proper.

2. On 27 February 2003, DoD issued similar guidance. See Memorandum, Under Secretary of Defense, (Comptroller), Subject: Availability of Operation and Maintenance Appropriations for Construction, (27 Feb. 2003). The DoD memorandum, in effect, adopted the Army's policy as articulated in the 22 February 2000 memorandum at the DoD level.
3. On 16 April 2003 the President signed the Emergency Wartime Supplemental Appropriation for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). The act's accompanying conference report stated, in rather harsh language, the conferees' legal objections to the Under Secretary of Defense (Comptroller)'s 27 February 2003 policy memorandum. The conference report had the practical effect of invalidating the policy guidance articulated in both the 22 February 2000 Deputy General Counsel (Ethics & Fiscal), Department of the Army Memorandum, as well as the 27 February 2003 Under Secretary of Defense (Comptroller) Memorandum.
4. On 6 November 2003 the President signed the Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, 117 Stat. 1209 (2003). Section 1301 of the act provided "temporary authority" for the use of O&M funds for military construction projects during FY 04 where the Secretary of Defense determines:
 - a) the construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of Operation Iraqi Freedom or the Global War on Terrorism;
 - b) the construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence;
 - c) the United States has no intention of using the construction after the operational requirements have been satisfied; and,
 - d) the level of construction is the minimum necessary to meet the temporary operational requirements. Pursuant to the act, this temporary funding authority was limited to \$150 million.

5. On 24 November 2003, the President signed the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1723 (2003). Section 2808 of the authorization act increased the amount of O&M funds DoD could spend on contingency and combat related construction in FY 04 to \$200 million, and adopted, unchanged, the determination requirements of the 04 Emergency Supplemental Appropriation .
6. On 1 April 2004, the Deputy Secretary of Defense issued implementing guidance for Section 2808 of the FY 2004 Defense Authorization Act. See Memorandum, Deputy Secretary of State, Subject: Use of Operation and Maintenance Appropriations for Construction during Fiscal Year 2004 (1 April 2004). Pursuant to this guidance, Military Departments or Defense Agencies are to submit candidate construction projects exceeding \$750,000 to the Under Secretary of Defense (Comptroller). The request will include a description and the estimated cost of the project, and include a certification by the Secretary of the Military Department or Director of the Defense Agency that the project meets the conditions stated in Section 2808 of the FY 04 Defense Authorization Act. The Under Secretary of Defense (Comptroller) will review the candidate projects in coordination with the Under Secretary of Defense (Acquisition, Technology, and Logistics), and the Under Secretary of Defense (Comptroller) will notify the Military Department or Defense Agency when to proceed with the construction project. The memorandum provides a draft format to be used for project requests, and is available at: <http://www.acq.osd.mil/dpap/Docs/policy/use%20of%20operation%20and%20maintenance%20appropriations%20for%20construction%20during%20fy2004.pdf>
7. Bottom Line. As a result of recent congressional developments, DoD can no longer fund combat and contingency related construction projects costing in excess of \$750,000 without first identifying clear, affirmative legislative authority. Section 2808 of the FY 04 Defense Authorization Act provides such authority. However, this authority is of limited in scope, funding and duration. Where this will leave the DOD in future years, or when the \$200 million limit is spent is an open question.

H. Other Military Construction Authorities.

1. Emergency Construction Projects. 10 U.S.C. § 2803. See DoD Dir. 4270.36; AR 415-15, paras. 1-6b(2) and 5-19, app. C; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

2. Projects Resulting from a Declaration of War or National Emergency. 10 U.S.C. § 2808. See DoD Dir. 4270.36; AR 415-15, para. 1-6b(7) and app. D, para. D-2; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.
3. Environmental Response Actions. 10 U.S.C. § 2810. See DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.
4. The Restoration or Replacement of Damaged or Destroyed Facilities. 10 U.S.C. § 2854. See DoD Dir. 4270.36; AR 415-15, para. 1-6b(3) and app. D, para. D-1; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.
5. Contingency Construction Projects. 10 U.S.C. § 2804. See DOD Dir. 4270.36; AR 415-15, para. 1-6b(6); AFI 32-1021, para. 5.2.3; AFI 65-601, vol. 1, para. 9.12.4; OPNAVINST 11010.20F, para. 6.4.5; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

I. Maintenance and Repair Projects.

1. Maintenance and repair projects are not construction. See AR 420-10, Glossary, sec. II. Therefore, maintenance and repair projects are not subject to the \$750,000 O&M limitation on construction. See 10 U.S.C. § 2811(a) (specifically permitting the Secretary of a military department to use O&M funds to carry out repair projects for “an entire single-purpose facility or one or more functional areas of a multipurpose facility”). But see 10 U.S.C. § 2811 (requiring secretarial approval if the estimated cost of the project exceeds \$5 million and congressional notification if the estimated cost of the project exceeds \$10 million).
2. Maintenance. AR 420-10, Glossary, sec. II, defines maintenance as the “work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose.” It includes work required to prevent damage and sustain components (e.g., replacing disposable filters; painting; caulking; refastening loose siding; and sealing bituminous pavements). See DA Pam 420-11, para. 1-6a.
3. Repair.

- a. Statutory Definition. 10 U.S.C. § 2811(e). A “repair project” is defined as a project to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.
- b. “New” DoD Definition. DoD Reg. 7000.14-R, vol. 2B, ch. 8, para. 080105. See Memorandum, Deputy Comptroller, Office of the Under Secretary of Defense (Program/ Budget), subject: Definition for Maintenance and Repair (2 July 1997) [hereinafter DoD Repair Memorandum]. The term “repair” means to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.
- c. Army Definition. See AR 415-15, para. 2-3b; AR 420-10, Glossary, sec. II; DA Pam 420-11, paras. 1-6 and 107; see also Memorandum, Assistant Chief of Staff for Installation Management, subject: New Definition of “Repair” (4 Aug. 1997) [hereinafter DA Repair Memorandum]. The term “repair” means to restore of a facility or a facility component to such a condition that the Army may use it effectively for its designated functional purpose.
 - (1) The DA Repair Memorandum states that: “The new definition is more liberal and expands [the Army’s] ability to provide adequate facilities for [its] soldiers and civilians;” however, the DA Repair Memorandum also states that: “A facility must exist and be in a failed or failing condition in order to be considered for a repair project.” Cf. DA Pam 420-11, para. 1-7e (stating that “[r]epair means that the facility or facility component has failed, or is in the incipient stages of failing, or is no longer performing the functions for which it was designated”).

V. INVESTMENT/EXPENSE THRESHOLD.

1. Expenses are costs of resources consumed in operating and maintaining DOD, and are normally financed with O&M appropriations. See [DOD FMR, vol. 2A, ch. 1, para. 010201](#). Common examples of expenses include:

- a. Labor of civilian, military, or contractor personnel;
 - b. Rental charges for equipment and facilities;
 - c. Food, clothing, and fuel;
 - d. Maintenance, repair, overhaul, and rework of equipment; and
 - e. Utilities.
2. Investments are “costs to acquire capital assets” or which have costs that will benefit both current and future periods and generally have a long life span. [DOD FMR, vol. 2A, ch. 1, para. 010201.D.2.](#) Investments are normally financed with procurement appropriations.
 3. Exception Permitting Purchase of Investments With O&M Funds. In each year’s Defense Appropriation Act, Congress has permitted DOD to utilize its Operation and Maintenance appropriations to purchase investment items having a unit cost that is less than a certain threshold. See e.g., [The Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8040 \(Oct. 23, 2002\)](#) (establishing that threshold at \$100,000); See also [DOD FMR, vol. 2A, ch. 1, para. 010201.D.1](#) (implementing that threshold).
 4. Expanded Threshold. In [Division M, § 106 of the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7 \(Feb. 20, 2003\)](#), Congress raised the investment/expense threshold to \$250,000. For DOD purchases made after 20 February 2003 one should utilize this expanded threshold to determine the proper source of funding. All DOD purchase made prior to 20 February 2003 should utilize the old (\$100,000) threshold to determine the proper source of funding. See also [DFAS-IN Manual 37-100-03, Appendix A, Expense/Investment Criteria](#) (implementing the expanded threshold for Army purchases).
 5. Systems. Various audits have revealed that local activities use O&M appropriations to acquire computer systems, security systems, video telecommunication systems, and other systems costing more than the investment/expense threshold. This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.

- a. Agencies must consider the “system” concept when evaluating the procurement of items. The determination of what constitutes a “system” must be based on the **primary function** of the items to be acquired, as stated in the approved requirements document.
- b. A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.
- c. Agencies may purchase multiple end items of equipment (e.g., computers), and treat each end item as a separate “system” for funding purposes, only if the primary function of the end item is to operate independently.
- d. Do not fragment or piecemeal the acquisition of an interrelated system of equipment merely to avoid exceeding the O&M threshold.
- e) Example: An agency is acquiring 200 stand-alone computers and software at \$2,000 each. The computers are being purchased primarily to operate as independent workstations. The agency should use O&M funds for this acquisition. If one of the primary reasons for purchasing the computers is so that their users could tie into a network and communicate with one another via email, the computers should be purchased with Procurement funds.

VI. USE OF OFFICIAL REPRESENTATION FUNDS.

- A. Representation funds are appropriations made available to the executive branch that may be expended without many of the normal controls. Throughout our history, Congress has provided representation funds for the use of the President and other senior agency officials. See Act of March 3, 1795, 1 Stat. 438. Congress and DoD regulate representation funds tightly because of their limited availability and the potential for abuse.
- B. Controls.
 - 1. [10 U.S.C. § 127](#).

2. [DOD Directive 7250.13, Official Representation Funds \(10 Sep. 2002\)](#)
3. [AR 37-47, Representation Funds of the Secretary of the Army \(31 May 1996\)](#).

C. Official Representational Funds (.0012).

1. These funds are available to extend official courtesies to dignitaries, officials, and foreign governments. [DOD Directive 7250.13, para. 3.1](#); [AR 37-47, para. 2-1](#); [AFI 65-603, para. 1](#); [SECNAVINST 7042.7J, para. 6](#). The commander may use the official representation funds to throw a reception or host a dinner for the distinguished visitor. In addition, the commander may use the official representation funds to purchase, gifts, mementos, or tokens for authorized guests.
 - a. Non DOD Distinguished Visitors. The gift may cost no more than \$285.00. See [DOD Directive 7250.13, para. E.2.4.1.8](#) (which cross references [22 U.S.C. § 2694](#) which in turn cross references [5 U.S.C. § 7342](#); the amount established in the latter statute is revised by GSA once every three years to take inflation into account and at [67 Fed. Reg. 56,495](#) was most recently raised to \$285) See also [AR 37-47, para. 2-9a\(1\)](#); [AFI 65-603, para. 4](#); [SECNAVINST 7042.7J, para. 6c\(1\)](#).
 - b. If the guest is from within DOD and is one of the specified individuals listed in [Enclosure 1 to DOD Directive 7250.13](#), then the command may present him or her with a gift valued at no more than \$40.00. See Department of Defense memorandum, dated 23 December 2002, subject: Official Representation Funds.
2. Representation funds are an element of the emergency and extraordinary expense funds appropriated for the use of the Secretary of the Army in the annual appropriations act. Not all agencies receive representation funds, and agencies may not use other appropriations for representation purposes. See [HUD Gifts, Meals, and Entertainment Expenses](#), B-231627, 68 Comp. Gen. 226 (1989).
3. Congress provides representation funds as a separate item in the Operation and Maintenance appropriation. Obligation in excess of the limitation is a violation of 31 U.S.C. § 1341, the Antideficiency Act.

4. Funds must be requested and made available before obligation. Requests for retroactive approval must be forwarded to the Secretary of the Army or his designee. AR 37-47, para. 3-1d.
5. Obligation of representation funds requires legal review. AR 37-47, para. 3-1f(2).
6. Prohibitions. AR 37-47, para. 2-10.
 - a. Expenses solely for entertainment of, or gifts to, DoD personnel, except for the select senior DoD personnel listed in AR 37-47, para. 2-4.
 - b. Retirements and change of command ceremonies, absent DA approval. AR 37-47, para. 2-4g; United States Army School of the Americas—Use of Official Representation Funds, B-236816, 69 Comp. Gen. 242 (1990) (new commander reception distinguished).
 - c. Classified projects and intelligence projects.
 - d. Membership fees and dues.
 - e. Personal expenses (e.g., holiday cards, calling cards, clothing, birthday gifts, etc.).
 - f. Gifts or flowers that an authorized guest wishes to present to another person.
 - g. Personal items purchased by an authorized guest.
 - h. Guest telephone bills.
 - i. Any cost associated with the event that is eligible for nonappropriated funds, except expenses of authorized guests.
 - j. Repair, maintenance, and renovation of DoD facilities.

7. The Secretary of the Army routinely considers exceptions to AR 37-47.
8. Miscellaneous Contingency Funds (.0014).
 - a. DA uses miscellaneous contingency funds for expenses for which Congress has not otherwise provided.
 - b. Examples.
 - (1) To reward search teams at the Gander air crash.
 - (2) To mitigate the impact following the Army's erroneous failure to withhold tax from soldiers' pay.
9. CINC Initiative Funds. This element of the O&M, Defense-Wide Appropriation is governed by 10 U.S.C. § 166a, which authorizes the Chairman of the Joint Chiefs of Staff to expend funds for specified purposes, including augmentation of other appropriations.

VII. AVAILABILITY AS TO TIME.

- A. The Time Rule. 31 U.S.C. §§ 1502(a), 1552. An appropriation is available for obligation for a definite period of time. An agency must obligate an appropriation during its period of availability, or the authority to obligate expires.
- B. The "Bona Fide Needs" Rule. 31 U.S.C. § 1502(a).
 1. Agencies may obligate appropriated funds only for properly incurred expenses of the period of availability of the appropriation. That is, the requirement must represent bona fide needs of the requiring activity arising during the period of availability of the funds proposed to be used for the acquisition. Modification to Contract Involving Cost Underrun, B-257617, 1995 U.S. Comp. Gen. LEXIS 258 (April 18, 1995); Magnavox—Use of Contract Underrun Funds, B-207453, Sept. 16, 1983, 83-2 CPD ¶ 401; To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 (1953); DFAS-IN 37-1, para. 080302.

2. Supply Contracts.

- a. General Rule. Supplies are the bona fide need of the fiscal year in which the agency needs or consumes them. Thus, supplies with which the agency needs to operate during a given fiscal year are generally the bona fide need of that fiscal year. See Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965).
- b. Exceptions. The Comptroller General has held that supplies ordered in one fiscal year for use in a subsequent fiscal year are the bona fide need of the year of purchase if one of two exceptions applies.
 - (1) The Stock-Level (Inventory) Exception. Supplies ordered to meet authorized stock levels are the bona fide need of the year of purchase, even if the agency does not use them until a subsequent fiscal year.
 - (2) The Lead-Time Exception. If the agency cannot obtain supplies on the open market when it needs them because the time required to order, produce, and deliver the supplies requires the agency to purchase them in a prior fiscal year, the supplies are considered the bona fide need of the year of purchase.

3. Service Contracts.

- a. General Rule. Services are generally the bona fide need of the fiscal year in which they are performed.
- b. Exceptions.

- (1) Severable Service Contracts. A military department or DoD agency may use current year funds to award a severable service contract for a period not to exceed 12 months at any time during the fiscal year. 10 U.S.C. § 2410a. See 41 U.S.C. § 2351 (providing similar authority for non-DoD agencies); 10 U.S.C. § 2410a(b) (providing similar authority for the Coast Guard); see also Funding of Maintenance Contract Extending Beyond Fiscal Year, B-207433, May 22, 1996, 96-1 CPD ¶ 247.
- (2) Non-Severable Service Contracts. An agency may use current year funds to award a non-severable service contract (i.e., a contract that seeks a single or unified outcome, product, or report), even if contract performance crosses fiscal year. See DFAS-IN 37-1, tbl. 8-1; DFAS-DE 7000-4, para. 4c(2); see also Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994) (concluding that work on an environmental impact statement properly crossed fiscal years).

VIII. AVAILABILITY AS TO AMOUNT.

- A. Administrative Subdivision of Funds. 31 U.S.C. § 1514(a) requires agencies to control the subdivision of appropriations.
 1. The Office of Management and Budget apportions funds over their period of availability to agencies for obligation. See 31 U.S.C. § 1512.
 2. Agencies subdivide these funds among their subordinate activities.
 3. In the Army, the Operating Agency/Major Command (MACOM) generally is the lowest command level at which the formal administrative subdivisions of funds required by 31 U.S.C. § 1514 are maintained for O&M appropriations. Below the MACOM level, O&M subdivisions generally are informal targets or allowances.
- B. Agencies promulgate regulations to control the use of funds. See DoD 7000.14-R, vol. 14, app. A; DFAS-IN Reg. 37-1; Air Force Procedures for Administrative Control of Appropriations Procedures.

IX. THE ANTIDEFICIENCY ACT.

A. Prohibitions. The Act prohibits any government officer or employee from:

1. making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A);
2. making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds, or amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). 31 U.S.C. § 1517(a)(2);
3. incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); or
4. accepting voluntary services unless otherwise authorized by law. 31 U.S.C. § 1342.

B. Reporting and Investigating Violations. 31 U.S.C. §§ 1351, 1517; OMB Cir. A-11, § 145.2; DOD FMR, vol. 14, chs. 4-7; DFAS-IN 37-1, ch. 4, para. 040204.

1. General. A violation of the Antideficiency Act is a serious matter. Violators are subject to appropriate administrative discipline, including suspension of duty without pay or removal from office. 31 U.S.C. § 1349(a). Knowing and willful violators are subject to a \$5,000 fine and imprisonment for two years. 31 U.S.C. § 1350.
2. Reporting Suspected Violations. An individual learning of or detecting a potential ADA violation must report within 10 working days the possible violation to their chain of command. DOD FMR, vol. 14, ch. 3, para. 030101. In the Army, individuals inform the Director of Resource Management (DRM) at the service activity of any potential violations and the DRM shall immediately notify the commander of the allowance/allotment involved. DOD FMR, vol. 14, ch. 3, para. 030102.
3. Investigations.

- a. The first step is a preliminary review to gather basic facts and determine whether an Antideficiency Act violation has apparently occurred. DOD FMR, vol. 14, ch. 3, para. A. Completion of the review is usually required within 90 days. DOD FMR, vol. 14, ch. 3, para. 030201. For Army activities, the preliminary review must be completed within 90 days after discovery of the potential violation. DFAS-IN 37-1, ch. 4, para. 040204.
- b. If the preliminary review determines that a violation occurred, a formal investigation must be initiated within 15 business days of the approval of the preliminary review report. DOD FMR, vol. 14, ch. 3, para. 030204. The purpose of the formal investigation is to determine the relevant facts and circumstances of the potential violation – if a violation has occurred, what caused the violation what are appropriate corrective actions and lessons learned, and who was responsible. DOD FMR, vol. 14, ch. 4, para. 0401. Typically, the MACOM commander approves/appoints an investigating officer (IO), who must be adequately trained and qualified to serve as an IO or as an investigative team member. DOD FMR, vol. 14, ch. 4, para. 040401; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, para. 4.3. A final report on the violation must reach the Office of the Under Secretary of Defense (Comptroller) within 9 months after the formal investigation began. DOD FMR, vol. 14, ch. 6, paras. 050201 and 603. Status reports on the investigation are due monthly to the OUSD (Comptroller) office. DOD FMR, vol. 14, ch. 6, para. 603.
- c. If the IO believes criminal issues may be involved, the investigation should be stopped immediately and the IO should consult with legal counsel to determine whether the matter should be referred to the appropriate criminal investigators for resolution. DOD FMR, vol. 14, ch. 5, para. 050301(E).

X. LIMITATION ON VOLUNTARY SERVICES. 31 U.S.C. § 1342.

- A. Voluntary Services. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. To Glenn English, B-223857, Feb. 27, 1987 (unpub.).

1. Voluntary services are those services rendered without a prior contract for compensation or without an advance agreement that the services will be gratuitous. Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.).
2. Acceptance of voluntary services does not create a legal obligation. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, July 30, 1990 (unpub.); Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). But see T. Head & Co. v. Dep't of Educ., GSBICA No. 10828-ED, 93-1 BCA ¶ 25,241.

B. Examples of Voluntary Services Authorized by Law

1. 5 U.S.C. § 593 (agencies may accept voluntary services in support of alternative dispute resolution).
2. 5 U.S.C. § 3111 (student intern programs).
3. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).
4. 10 U.S.C. § 2602 (the President may accept assistance from Red Cross).
5. 10 U.S.C. § 10212 (the SECDEF or a Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).
6. 33 U.S.C. § 569c (the Corps of Engineers may accept voluntary services on civil works projects).

- C. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. Voluntary Servs.—Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923). This exception does not include “ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342.
- D. Gratuitous Services Distinguished.
1. It is not a violation of the Antideficiency Act to accept free services from a person who agrees, in writing, to waive entitlement to compensation. Army’s Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat’l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.); To the Adm’r of Veterans’ Affairs, B-44829, 24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm’n, A-23262, 7 Comp. Gen. 810 (1928).
 2. An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov. 15, 1988 (unpub.); The Agency for Int’l Dev.—Waiver of Compensation Fixed by or Pursuant to Statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); In the Matter of Waiver of Compensation, Gen. Servs. Admin., B-181229, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); To the President, United States Civil Serv. Comm’n, B-66664, 26 Comp. Gen. 956 (1947).
 3. Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program—State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, Jan. 2, 1987 (unpub.) (augmentation would occur) with Senior Community Serv. Employment Program, B-222248, Mar. 13, 1987 (unpub.) (augmentation would not occur). But see Federal Communications Comm’n, B-210620, 63 Comp. Gen. 459 (1984) (noting that augmentation entails receipt of funds).

XI. VOLUNTARY CREDITOR RULE.

- A. Definition. A voluntary creditor is one who uses personal funds to pay a perceived valid obligation of the government.
- B. Reimbursement. Generally, an agency may not reimburse a voluntary creditor. Specific procedures and mechanisms exist to ensure that the government satisfies its valid obligations. Permitting a volunteer to intervene in this process interferes with the government's interest in ensuring its procedures are followed. Bank of Bethesda, B-215145, 64 Comp. Gen. 467 (1985).
- C. Claims Recovery. U.S. International Trade Commission – Cultural Awareness, B-278805, July 21, 1999 (unpub.) (noting that agencies, not the GAO, now must render decisions on such claims); Lieutenant Colonel Tommy B. Tompkins, B-236330, Aug. 14, 1989 (unpub.); Claim of Bradley G. Baxter, B-232686, Dec. 7, 1988 (unpub.); Irving M. Miller, B-210986, May 21, 1984 (unpub.); Grover L. Miller, B-206236, 62 Comp. Gen. 419 (1983); Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. See Reimbursement of Selective Serv. Employee for Payment of Fine, B-239511, 70 Comp. Gen. 153 (1990) (returning request for decision to agency so it could determine who was responsible for paying fine); see also DFAS-IN 37-1, ch. 9, para. 092037; cf. Use of Imprest Fund to Reimburse Employee for Small Purchase, B-242412, July 22, 1991 (unpub.). Claims are recoverable if:
 - 1. The claimant shows a public necessity;
 - 2. The underlying expenditure is authorized;
 - 3. The claim is for goods or services; and
 - 4. The expenditure is not for a personal use item.

XII. PASSENGER CARRIER USE. 31 U.S.C. § 1344; 41 C.F.R. SUBPARTS 101-6.4 AND 101-38.3.

- A. Prohibition. An agency may expend funds for the maintenance, operation, and repair of passenger carriers only to the extent that the use of passenger carriers is for official purposes. Federal Energy Regulatory Comm'n's Use of Gov't Motor Vehicles and Printing Plant Facilities for Partnership in Educ. Program, B-243862, 71 Comp. Gen. 469 (1992); Use of Gov't Vehicles for Transp. Between Home and Work, B-210555, 62 Comp. Gen. 438 (1983). Violations of this statute are not violations of the Antideficiency Act, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Comm'n, 820 F.2d 391 (Fed. Cir. 1987); Campbell v. Department of Health and Human Servs., 40 M.S.P.R. 525 (1989); Gotshall v. Department of Air Force, 37 M.S.P.R. 27 (1988); Lynch v. Department of Justice, 32 M.S.P.R. 33 (1986).
- B. Exceptions.
1. Generally, the statute prohibits domicile-to-duty transportation of appropriated and nonappropriated fund personnel.
 - a. The agency head may determine that domicile-to-duty transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity. 31 U.S.C. § 1344(b)(8).
 - b. The statute authorizes domicile-to-duty transportation if it is necessary for fieldwork or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).
 2. Overseas, military personnel, federal civilian employees, and family members may use government transportation when public transportation is unsafe or unavailable. 10 U.S.C. § 2637.

3. This statute does not apply to the use of government vehicles (leased or owned) when employees are in a temporary duty status. See Home-to-Airport Transp., B-210555.44, 70 Comp. Gen. 196 (1991) (use of government vehicle for transportation between home and common carrier authorized in conjunction with official travel); Home-to-Work Transp. for Ambassador Donald Rumsfeld, B-210555.5, Dec. 8, 1983 (unpub.).

C. Penalties.

1. Administrative Sanctions. Commanders shall suspend without pay for at least one month any officer or employee who willfully uses or authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates 31 U.S.C. § 1344. Commanders also may remove violators from their jobs summarily. 31 U.S.C. § 1349(b).
2. Criminal Penalties. Title 31 does not prescribe criminal penalties for unauthorized passenger carrier use. But see UCMJ art. 121 [10 U.S.C. § 921] (misappropriation of government vehicle; maximum sentence is a dishonorable discharge, total forfeiture of pay and allowances, and 2 years confinement); 18 U.S.C. § 641 (conversion of public property; maximum punishment is 10 years confinement and a \$10,000 fine).

XIII. AUGMENTATION OF APPROPRIATIONS & MISCELLANEOUS RECEIPTS.

A. General Rule - Augmentation of Appropriations Is Not Permitted.

1. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. Generally, this results in expenditures by the agency in excess of the amount originally appropriated by Congress.
2. Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:
 - a. [Article I, Section 9, Clause 7 of the United States Constitution](#).

No money shall be drawn from the treasury except in consequence of appropriations made by law.

b. [31 U.S.C. § 1301\(a\)](#) (Purpose Statute).

Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

c. [31 U.S.C. § 3302\(b\)](#) (Miscellaneous Receipts Statute).

Except as . . . [otherwise provided] . . . an official or agent of the government receiving money for the government from any source shall deposit the money in the Treasury as soon as practical without any deduction for any charge or claim.

3. Types of Augmentation.

- a. Augmenting by using one appropriation to pay costs associated with the purposes of another appropriation. This violates the Purpose Statute, 31 U.S.C. § 1301(a). U.S. Equal Employment Opportunity Comm'n – Reimbursement of Registration Fees for Fed. Executive Board Training Seminar, B-245330, 71 Comp. Gen. 120 (1991); Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); Department of Health and Human Servs.—Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).
- b. Augmenting an appropriation by retaining government funds received from another source.

- (1) This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See Scheduled Airlines Traffic Offices, Inc. v. Dep't. of Def., 87 F.3d 1356 (D.C. Cir. 1996) (indicating that a contract for official and unofficial travel, which provided for concession fees to be paid to the local morale, welfare, and recreation account, violates Miscellaneous Receipts Statute; note, however, that Congress has subsequently enacted statutory language – found at [10 U.S.C. § 2646](#) – that permits commissions or fees in travel contracts to be paid to morale, welfare, and recreation accounts); Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992); But see Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (noting that 31 U.S.C. § 3302 **only applies to monies** received, not to other property or services).
- (2) Expending the retained funds generally violates the constitutional requirement for an appropriation. See Use of Appropriated Funds by Air Force to Provide Support for Child Care Ctrs. for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988).

B. Statutory Exceptions to the Miscellaneous Receipts Statute. Some examples of the statutes Congress has enacted which expressly authorize agencies to retain funds received from a non-Congressional source include:

1. Economy Act. [31 U.S.C. § 1535](#) authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. [31 U.S.C. § 1536](#) specifically indicates that the servicing agency should credit monies received from the ordering agency to the “appropriation or fund against which charges were made to fill the order.” See also [41 U.S.C. § 23](#) (providing similar intra-DOD project order authority).
2. Foreign Assistance Act. [22 U.S.C. § 2392](#) authorizes the President to transfer State Department funds to other agencies, including DOD, to carry out the purpose of the Foreign Assistance Act.

3. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. See [10 U.S.C. § 2208](#); National Technical Info. Serv., B-243710, 71 Comp. Gen. 224 (1992); Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (1960).
4. Proceeds received from bond forfeitures, but only to the extent necessary to cover the costs of the United States. [16 U.S.C. § 579c](#); USDA Forest Serv.—Auth. to Reimburse Gen. Appropriations with the Proceeds of Forfeited Performance Bond Guarantees, B-226132, 67 Comp. Gen. 276 (1988); National Park Serv.—Disposition of Performance Bond Forfeited to Gov't by Defaulting Contractor, B-216688, 64 Comp. Gen. 625 (1985) (forfeited bond proceeds to fund replacement contract).
5. Defense Gifts. [10 U.S.C. § 2608](#). The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress.
6. Health Care Recoveries. [10 U.S.C. § 1095\(g\)](#). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.
7. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts “shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned.” [42 U.S.C. § 2651](#). The U.S. Army Claims Service has taken the position that such recoveries should be credited to the installation’s operation and maintenance account. See [Affirmative Claims Note, *Lost Wages under the Federal Medical Care Recovery Act*, ARMY LAW., Dec, 1996, at 38.](#)
8. Military Leases of Real or Personal Property. [10 U.S.C. § 2667\(d\)\(1\)](#). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the military department and used for facility maintenance, repair, or environmental restoration.

9. Damage to Real Property. [10 U.S.C. § 2782](#). Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.
10. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. [10 U.S.C. § 2575](#). Proceeds are credited to the operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities.
11. Host nation contributions to relocate armed forces within a host country. [10 U.S.C. § 2350k](#).

XIV. CONCLUSION.